STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-801

WILLIAM ANDERSON,

Petitioner,

v.

THE CITY OF PHOENIX, a municipal corporation and RUFUS C. COULTER, JR., Judge of the Superior Court, Maricopa County, Arizona,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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This matter comes before this Court on the Petition of WILLIAM ANDERSON for a Writ of Certiorari pursuant to Rule 19,

Supreme Court Rules. The contents of that Petition with regard to the opinion below, jurisdiction, statement of the case and finality of the judgment are substantially correct and are hereby adopted by your Respondents.

Opposition to the granting of the Petition is grounded on the fact that the decision rendered by the Supreme Court of the State of Arizona is in accord with applicable decisions of this Court and while this precise issue has never been presented to this Court other decisions of this Court are supportive of the findings below.

ARGUMENT

THE COMPELLED PRODUCTION OF AN ALLEGEDLY OBSCENE MOTION PICTURE, PURSUANT TO A SUBPOENA DUCES TECUM, AT A PRIOR ADVERSARY HEARING FULLY COMPORTS WITH CONSTITUTIONAL REQUIREMENTS AND WITH THE APPLICABLE DECISIONS OF THIS COURT.

It should first be pointed out to this Court that the action initiated by

your Respondents, which is the subject of this Petition, was a civil action, in the nature of a probable cause hearing, for the determination of the issue of obscenity of a motion picture film alleged to be obscene. In the Petition filed in this cause, counsel for Petitioner Anderson has cited numerous cases for the proposition that "exercise of First Amendment rights cannot be conditioned upon payment of a price and that the assertion of one constitutional right cannot waive another".

One of the cases cited in support of the foregoing position is Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed 2d 1247 (1968). In the Simmons case this Court stated that "we find it intolerable that one constitutional right should have to be surrendered in order to assert another". That holding however, with its exclusions, readily applies to the instant case. This Court went on to

state that:

> "When a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, this testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." 390 U.S. at page 394, 19 L.Ed 2d at page 1259.

The hearing at which production of the film was compelled by a subpoena duces tecum can certainly be viewed as either a probable cause hearing or as being similar to a hearing upon a motion to suppress. This being the case, testimony of the Petitioner would be excluded and no prejudice to him would attach.

The procedure used in the instant case has evolved due to the decisions of the Courts of Appeal both of the Ninth Circuit and the State of Arizona compelling a Prior Adversary Hearing before seizure of an allegedly obscene motion picture. For this Court to preclude com-

pelled production of the film at such a hearing thwarts the entire thrust and purpose of the hearing and gives carte blanche to an individual commercially exhibiting pornography to continue in his activities.

Additionally, the case Katz v. United States, 389 U.S. 347, 88 S.Ct 507, 19 L. Ed 2d 579 (1967) cited by the Ninth Circuit Court of Appeals in United States v. Jackson, 448 F2d 963 (1971) and by the Arizona Supreme Court and State v. Fasler, _____ Ariz. _____, 503 P2d 803 (1972) while dealing with the Fourth Amendment offers some guidance in the instant matter. In the Katz case, supra, this Court stated:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject for Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

(Citations omitted) 389 U.S. at page 351-2; 19 L. Ed 2d at page 582.

It is inconceivable that an individual who has shown a motion picture openly, notoriously and publicly to any one with the price of admission can then claim that these are private and personal materials protected by the Fifth Amendment to the United States Constitution. It is ludicrous to believe that a court cannot compel the production and showing of a motion picture film when, at the same time, the film is commercially displayed in a public theater and the judge could see it if he went to the theater and paid the admission price. If for no other reason than to maintain the dignity of the court, approval of the procedure used here is required.

Additionally, four circuits of the United States Court of Appeals have held that a motion picture must be produced

for purposes of prosecution. While the opinions of these courts have not indicated whether a Fifth Amendment objection was interposed there vitality and validity can not be questioned.

In the case of Tyrone, Inc. v. Wilkinson, (4th Cir., 1969) 410 F2d 639, cert denied 396 U.S. 958, 90 S.Ct. 478, 24 L.Ed 2d 449, the Court stated:

> " . . . . we will require the theatre to make available a copy of (the motion picture in question) for the preparation and trial of the criminal cases. Metzger v. Pearcy, 393 F2d 202, 204 (7th Cir., 1968)." (At Pp 640-1; additional material added.)

The Tyrone court went on to say that in compelling a prior adversary hearing before seizure of the motion picture

> "Metzger, included a requirement, which we find reasonable and also adopt, that the theatre deliver to the Commonwealth's Attorney upon request, a copy of the movie for reasonable use in the preparation and trial of the charge now pending in the State court." (At page 641).

The Second Circuit Court of Appeals has specifically authorized the procedure which was utilized by the Respondent City of Phoenix in this case. The Court stated:

> "The Appellants (the prosecuting authority) contend that a print of the motion picture is needed for purposes of prosecution. There are a number of ways in which this can be accomplished without seizure of the film. The court can direct that a print be made available to the prosecution; a subpoena duces tecum can be used."
>
> "Finally it is suggested that unless the police or other local authorities have actual possession of the film pending the required adversary proceeding, the distributor may take advantage of the delay, for example, by shipping the film out of the jurisdiction or by cutting out the offending scenes. If there is a real threat of such activity it can be controlled by an ex parte restraining order." Bethview Amusement Corp. v. Cahn, (2nd Cir., 1969) 416 F2d 410, cert. denied 392 U.S. 920, 90 S.Ct. 929 (1970). (Additional material added.)

See also: United States v. Alexander, (8th Cir., 1970) 428 F2d 1169, 1176.

It should be noted that the above decisions compel the production of the film not only for the adversary hearing but also compel its production for preparation and use in the trial of the criminal charges which may be brought following the adversary hearing.

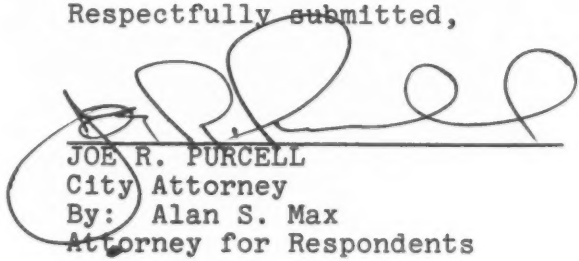
Petitioner has brought before this Court a parade of the horribles carrying the limited procedural method here used to extremes certainly not contemplated by Respondents and which could not, and should not, be condoned by this Court. However, since the courts have created certain peculiar procedural requirements with regard to obscenity prosecutions, the procedure here used fully comports with those requirements and the protection of the Petitioner's rights so as to grant him full constitutional protection while not ignoring the laws obligation to the community with regard

to effective criminal prosecution.

CONCLUSION

Based upon the foregoing it is clear that the decision of the Supreme Court of the State of Arizona in Anderson v. Coulter, _____Ariz. _____, 499 P.2d 103 (1972) fully comports with constitutional requirements and the applicable decisions of this Court and therefore this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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